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Executive Secretary

14 Oct 87

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Date

15 Oct 87

TO: (Name, office symbol, room number,
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Date

1. Director of Logistics

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General Services Administration
Office of Acquisition Policy
Washington, DC 20405

Executive Registry
87-3409 X

OCT 8 1987



CIVILIAN AGENCY ACQUISITION COUNCIL LETTER NO. 87-4

TO: Civilian Agencies, other than NASA

SUBJECT: Small business set-asides (Sec. 921, Pub. L. 99-661)

Federal Acquisition Circular (FAC) 84-31 amends the Federal Acquisition Regulation (FAR) to implement amendments made to Sections 8 and 15 of the Small Business Act by Section 921, Public Law 99-661.

The revisions (i) adopt the statutory prohibition against award of set-aside and 8(a) contracts at a price exceeding fair market price; (ii) require that a fair proportion of Government contracts within each industrial category be awarded to small business concerns; (iii) implement statutory restrictions concerning the extent of subcontracting permitted under set-aside and 8(a) contracts; and (iv) provide direction concerning the release of names and addresses of prospective offerors.

These revisions are being issued as an interim rule and are effective October 1, 1987, except that the revisions made to FAR 19.508(e) and 52.219-14 are effective for those solicitations issued on or after October 1, 1987. Solicitations issued before October 1, 1987, should be amended to incorporate the clause at 52.219-14 unless to do so would unduly delay the contract action.

This CAAC Letter provides a copy of the revised FAR language. Please ensure that this information is distributed to your contracting offices for their immediate use pending distribution of the FAC.

HARRY S. ROSINSKI
Acting Chairman
Civilian Agency Acquisition Council

Enclosure



Federal Acquisition Circular (FAC) 84-31 amends the Federal Acquisition Regulation (FAR) as specified below:

ITEM I--Small Business Set-Asides; Implementation of Section 921 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661).

Section 921 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Small Business Set-Asides," amended Sections 8 and 15 of the Small Business Act (15 U.S.C. 637; 15 U.S.C. 644) in order to increase participation by small business and small disadvantaged business concerns in the Federal procurement process. Identical amendments to the Small Business Act were contained in the Department of Defense Appropriations Act, 1987 (Pub. L. 99-591). At a later date, technical corrections to the amendments were made by the Defense Technical Corrections Act of 1987 (Pub. L. 100-26). This interim rule revises certain sections of Federal Acquisition Regulation (FAR) Parts 14, 19, and 52 in order to conform FAR procurement procedures with the statutory amendments. Other provisions of Section 921 which require rulemaking by the Small Business Administration (e.g., size determination program) are addressed in separate issuances by the Small Business Administration in the Federal Register on March 17, 1987 (52 FR 8261), and on August 31, 1987 (52 FR 32870), and, except as noted in paragraph 8 of this item, are beyond the scope of the present rulemaking.

The following summarizes the principal FAR revisions made by the interim rule and provides a parenthetical reference to the Section 921 requirement implemented by the revision:

1. FAR 19.001 is revised to add a definition of "fair market price," consistent with previous use of the term (see former FAR 19.806-1(a)) in order to give effect to the requirement that set-aside and 8(a) contracts not exceed fair market prices. (Sec. 921(b)(1) and (2)). FAR 19.806-1(a) is deleted as surplusage.

2. FAR 19.202-6 is added to provide additional guidance to contracting officers in determining fair market price in view of the statutory award price restriction. (Sec. 921(b)(1) and (2)).

3. FAR 19.501(j) is added as a further reference to the award price restriction (Sec. 921(b)(1) and (2)). The phrase "except as authorized by law" is added to accommodate certain statutory exceptions to the limitation (e.g., Sec 1207, Pub. L. 99-661 permits payment of a 10 percent price differential in DoD contract awards to small disadvantaged businesses) (see 52 FR 16263; May 4, 1987).

4. FAR 19.501(k) is added to implement statutory direction concerning release of names and addresses of prospective offerors. (Sec. 921(e)).

5. FAR 19.502-1 is amended to reflect statutory guidance that separate industry categories are to be used in ensuring that a fair proportion of contract awards are made to small businesses. (Sec. 921(a)).

6. FAR 19.508(e) is added to prescribe a contract clause relating to the composition of a contractor's labor force, as a limitation upon subcontracting, for use under total and

partial small business set-asides and 8(a) contracts. (Sec. 921(c)).

7. FAR 19.805(b) is added to reference the fair market price limitation concerning 8(a) contracts. (Sec. 921(b)(2)).

8. FAR 52.219-14, Limitations on Subcontracting, is added to provide a contract clause for use in set-aside and 8(a) contracts regarding the composition of a contractor's labor force. (Sec. 921(c)). The statute requires in service contracts (except construction) that at least 50 percent of a contractor's personnel costs be expended for employees of the concern. Similarly, in supply contracts (other than those involving regular dealers) 50 percent of the cost of manufacturing supplies, excluding materials, must be performed by the concern. With respect to construction contracts, the statute requires the Small Business Administration to establish similar requirements concerning general and specialty construction contracts. Pending completion of the public comment process (see 52 FR 8261; 52 FR 32870), the Small Business Administration has requested that the FAR Councils adopt the percentage limitations contained in the clause on an interim basis until a final rule is promulgated by the Small Business Administration.

Therefore, 48 CFR Parts 14, 19, and 52 are amended as set forth below:

1. The authority citation for Parts 14, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 14--SEALED BIDDING

14.205-5 [Amended].

2. Section 14.205-5 is amended in paragraph (a) by removing the period at the end of the sentence and adding a parenthetical cross reference "(see also 19.501(k))."

PART 19--SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

3. Section 19.001 is amended by adding alphabetically a definition to read as follows:

19.001 Definitions.

* * * * *

"Fair market price," as used in this part, means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost (see 19.202-6).

* * * * *

4. Section 19.202 is amended by adding a subsection to read as follows:

19.202-6 Determination of fair market price.

Agencies shall determine the fair market price of small business set-aside and 8(a) contracts as follows:

(a) For total and partial small business set-aside contracts, determine the fair market price to be the price achieved in accordance with the reasonable price guidelines in 15.805-2.

(b) For 8(a) contracts, both with respect to meeting the requirement at 19.805(b) and in order to accurately estimate the current fair market price and business development expense, contracting officers shall follow the procedure at 19.806-2.

5. Section 19.501 is amended by adding paragraphs (j) and (k) to read as follows:

19.501 General.

* * * * *

(j) Except as authorized by law, a contract may not be awarded as a result of a set-aside if the cost to the awarding agency exceeds the fair market price.

(k) After a decision to set-aside a procurement for small business concerns, the contracting officer shall, within five (5) working days after receipt of a written request, provide the requestor with a list of the names and addresses of the small business concerns expected to respond to the solicitation. However, (1) the Secretary of Defense may decline to provide this information in order to protect national security, and (2) the contracting officer is not required to release information that is not required to be released under the Freedom of Information Act (5 U.S.C. 552).

6. Section 19.502-1 is amended by revising paragraph (c) to read as follows:

19.502-1 Requirements for setting aside acquisitions.

* * * (c) assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns, and when the circumstances described in 19.502-2 or 19.502-3(a) exist.

7. Section 19.508 is amended by adding paragraph (e) to read as follows:

* * * * *

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business, or if the contract is to be awarded under Subpart 19.8.

8. Section 19.805 is amended by redesignating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

19.805 Pricing the 8(a) contract.

* * * * *

(b) An 8(a) contract may not be awarded if the price of the contract results in a cost to the awarding agency which exceeds a fair market price.

19.806-1 [Amended].

9. Section 19.806-1 is amended by deleting paragraph (a) and redesignating the existing paragraphs (b) and (c) as paragraphs (a) and (b).

PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Part 52 is amended by adding a subsection to read as follows:

52.219-14 Limitations on Subcontracting.

As prescribed in 19.508(e), insert the following clause:

LIMITATIONS ON SUBCONTRACTING (OCT 1987)

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

(a) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(b) Supplies (other than procurement from a regular dealer in such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(c) General construction. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(d) Construction by special trade contractors. The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

(End of clause)